82-1932

Docket No.

In the Supreme Court of the United States

October Term, 1982

MYLES E. BILLUPS, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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of the Bar of the Supreme
Court of the United States
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QUESTIONS PRESENTED

1. Whether the Fourth Circuit's novel interpretation that venue will lie in the Eastern District of Virginia in the prosecution for an alleged violation of 29 U.S.C. § 186(b)(the Taft-Hartley Act) where the entire transaction was commenced and completed in a resturant in New York City violated Petitioner's Article III and Sixth Amendment rights to be tried in the District in which the alleged offense occurred?

2. Whether a conviction for an alleged violation of 18 U.S.C. § 1951 (the Hobbs Act) can be properly sustained where the alleged victim himself testified that he did not harbor any physical or economic fear, and where the only evidence of fear was wholly speculative and extremely slight?

3. Whether the Fourth Circuit's refusal to grant Petitioner a new trial

in light of a juror's failure to disclose material information on voir dire when under a duty to do so, and thereby creating a serious intercircuit conflict, denied Petitioner his Sixth and Fourteenth Amendments rights to a fair trial and an impartial jury?

4. Whether the Fourth Circuit's novel interpretation of New York State Law bribery under 18 U.S.C. § 1952 (the Travel Act) as also embracing the New York State law prohibiting the alleged receipt of a bribe, as opposed to only the alleged giving of a bribe, violated the clear statutory mandates of the Travel Act, and denied Petitioner his fundamental rights of Due Process under the Fifth and Fourteenth Amendments of the United States Constitution?

I N D E X

CITATIONS

Cases:

STATUTES:

CONSTITUTION OF THE UNITED STATES

MISCELLANEOUS

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

MYLES E. BILLUPS, SR.,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Myles E. Billups, Sr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming his Final Judgment of convictions of violations of Title 18, U.S.C §1951; Title 18 U.S.C. §1952(a)(3); and two (2) violations of Title 29 U.S.C. §186(b),

entered in the United States District Court for the Eastern District of Virginia, Norfolk, Virginia.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fourth Circuit, denying Petitioner's Petition For Rehearing And Suggestion For Rehearing En Banc was filed on March 29, 1983, and is printed in the Appendix to this Petition (App. 1a). The Opinion of the Court of Appeals was filed on October 15, 1982, and was amended by an Order entered by the Court of Appeals on April 29, 1983. The Amended Opinion of the Court of Appeals is reported at 692 F.2d 320, and is printed in the Appendix to this Petition (App. 2a - 52a). The Order of the Court of Appeals amending the Opinion is printed in the Appendix hereto (App. 53a - 54a). The Memorandum and Order of the Trial Court affirming

the jury verdict of conviction is reported at 522 F.Supp. 935.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the Trial Court was invoked pursuant to 18 U.S.C. §2331.

STATUTES INVOKED

Title 18 U.S.C. §1951 is reprinted in the Appendix hereto. (App. 55a - 57a)

Title 18 U.S.C. §1952(a)(3) is reprinted in the Appendix hereto. (App. 58a - 59a)

Title 29 U.S.C. §186(b) is reprinted in the Appendix hereto (App. 60a - 61a)

STATEMENT OF THE CASE

1. The Nature of the Case and Proceedings Below

The Petitioner, Myles E. Billups, Sr., was charged in a ten (10) count indictment filed in the United States District Court for the Eastern District

of Virginia, Norfolk Division, on November 20, 1980, with two (2) violations of Title 18 U.S.C. §1951, alleging Hobbs Act extortion; two (2) violations of 18 U.S.C. §1952(a)(3), The Travel Act; and six (6) violations of 29 U.S.C. §186(b), Taft-Hartley misdemeanors. The indictment is reprinted in the Appendix hereto (App. 62a - 73a).

During the course of trial proceedings two of the Taft-Hartley misdemeanor charges were dismissed by the Trial Judge.

After a ten day trial on the remaining eight counts of the indictment, Billups on March 26, 1981, was found guilty by the jury of four counts, to-wit: (1) One violation of 18 U.S.C. §1951, the Hobbs, Act (Count One); (2) One of 18 U.S.C. §1952(a)(3), the Travel Act (Count Two); (3) and two violations of 29 U.S.C. §186(b), Taft-Hartley

misdemeanor (Counts Eight and Nine). The jury found Billups not guilty of the charges in Counts Three, Four, Six and Seven of the indictment.

Post trial motions were filed by the defendant for a Judgment of Acquittal and a New Trial. A hearing and argument was held on August 4, 1981, and all motions were denied, the Court filing a written Memorandum Opinion on August 28, 1981. United States v. Myles E. Billups, Sr., 522 F.Supp 935 (E.D.Va. 1981)

Because the matter had received extensive pretrial publicity, the Trial Court had granted extensive voir dire procedures. During these procedures One Jadis Battle, who ultimately was selected and who served as a juror, did not reveal that her son, one William Battle, was, in fact, a member of Port Handlers Local 1458 of the Longshoreman's

Association, although the questionnaire submitted to each potential juror when completed by them included the following specific question:

> "23. Are you or any immediate member of your family a member of a labor union, and, if so, designate the name of the union and its local number, if any?" (Juror Questionnaire, Tr. 1-2)

That juror's son's Local had a long-standing animosity toward the defendant because of some of his official Union policies which the men thought had discriminated against their Local and had deprived them of work (Tr. 110).

Notwithstanding that the defendant moved to set aside his convictions on the grounds of juror misconduct based on the juror, Battle's, failure to disclose material information, the Trial Court Judge overruled the Motion even though the defendant represented that he would have struck the juror Battle

from the Jury Panel had the informa-
been disclosed.

Thereafter, on August 28, 1981, the Court sentenced the defendant as follows: (1) a term of three years imprisonment and a $5,000.00 fine on Count One of the Indictment; (2) a term of three years imprisonment and a $5,000.00 fine on Count Two of the Indictment, the term of imprisonment to run concurrently with that imposed on Count One; (3) a term of one year imprisonment and a $5,000.00 fine on Count Eight of the Indictment, the imprisonment to run concurrently with the sentences previously imposed; and (4) a term of one year imprisonment and a $5,000.00 fine on Count Nine, the imprisonment to run concurrently with the sentences theretofore imposed.

Thereafter Billups appealed his conviction to the United States Court

of Appeals For The Fourth Circuit, and oral argument was held on April 1, 1982. The Court of Appeals affirmed his conviction by an Opinion entered and filed on October 15, 1982 (App. 2a - 52a)

Thereafter Billups filed a Petition For Rehearing And Suggestion For Rehearing En Banc. By Order filed on March 29, 1983, the United States Court of Appeals For the Fourth Circuit denied his Petition For Rehearing (App. 1a). The Court of Appeals further by Order entered on April 29, 1983 amended the Opinion previously rendered herein (App. 53a - 54a)

2. Statement of Facts

I. The Defendant, Myles E. Billups, Sr., and the Port of Hampton Roads

Myles E. Billups, Sr. is a 54 year old native of the City of Norfolk. He has been married 38 years with a family

of seven children (Tr. 2071).

Billups started working on the docks in 1943 as a warehouseman and member of the International Longshoreman's Union (hereinafter "ILA"), and in 1975 was elected to the top labor port in the port of Hampton Roads, namely, International Vice President of the ILA.

The Employers of the Port (Tr. 1680, 1684), are virtually unanimous in their praise of Billups based on decades of personal friendship and industry relationships, and have described him variously as a "vital link in our total operation of the Port"; as being responsible for an excellent" labor climate in the Port of Hampton Roads, which "measures favorably with any Ports in the country" (Tr. 1684); and as a man of "unblemished character".

Mr. Billups has never been convicted

of any criminal offense prior to the charges leveled against him in this case.

II. The Unirac Investigation

The Indictment of the defendant was part of a four year investigation known as UNIRAC (Union Racketeering) conducted by the Department of Justice, United States Attorneys, the FBI and the Internal Revenue Service for the entire Atlantic Coast.

Some 2,000 tape recordings, both consensual and non-consensual were made by the Government as a part of that investigation in New York alone. None of those tapes were introduced by the government and none of those 2,000 tapes in any way supported the charges contained in the indictment returned against Billups; and none of the estimated 100 surreptitiously recorded conversations in Hampton Roads were introduced on behalf of the government.

As a part of the investigation against Billups, the government themselves initiated and created three meetings involving Billups, William Montella and John Marano, two admitted felons. "Sonny" Montella, former general manager of Quin Marine, a New York company which opened a branch in Norfolk between 1974 and 1976, is a convicted extortionist. He admitted that for years he had lied, cheated, stolen money and made illegal payoffs in New York, on the waterfront.

The other Government informer, John R. Marano, was likewise a convicted felon, who also became a government informer to escape punishment for his admitted crimes. Marano, a former officer of Prudential Lines in New York, admitted becoming "a part of bribes and the cheating and the kickbacks and the stealing" (Tr. 1083) from his own employer and others; and, admitted

that he cooperated with the FBI to avoid prosecution of multiple crimes against him (Tr. 1130).

III. The "S.S. LASH PACIFICO" Incident

Count One, under the Hobbs Act, alleged an attempt by Billups to obtain $10,000.00 from Marano, by extortion, "induced by the wrongful use of fear".

In August, 1975, a Prudential ship, the S.S. LASH PACIFICO, sustained damage and could not load or unload any barges. She was moved to Portsmouth, for repairs, and on September 6, 1975, was unloaded by Navy personnel, rather than ILA longshoremen, which violated the terms of an existing contract between the ILA and the Hampton Roads Shipping Association (Tr. 1773)

When the ILA members learned that Prudential had violated their contract they requested Billups to take the

matter to the Contract Board of the Hampton Roads Shipping Association for adjudication of their claim (Tr. 2129). On September 9, 1975, there was a regular meeting of the Board (Tr. 64) attended by representatives of the Shipping Association and the ILA. The Board ruled that the work properly belonged to the ILA and that "two gangs should be paid for the time that that work was performed" (Tr. 1527). That ruling was an order to Prudential to "sit down and negotiate a settlement with the Union" (Tr. 1780).

After "arms-length negotiation" the opposing sides agreed on 50 hours time being paid in accordance with the Board's decision (Tr. 2134). Eventually those hours multiplied out to $28,560.75 in wages at the prevailing rate (Tr. 1728).

The net amount, less deductions for insurance taxes and assessments

(Tr. 1730) was paid during the second week of November (Tr. 1735) to each individual longshoreman, whose names had been supplied to Nacirema by the ILA. The remainder of the money that had been deducted was paid by Nacirema to the proper recipients. Billups received no money (Tr. 1731).

Marano testified that he told Prudential's financial officer, one Ytuarte, in New York, that the ILA's claim "could be as high as $134,000.00" (Tr. 992), but that it could be reduced to $29,000.00, if a $10,000.00 payoff was made to Myles Billups. Billups denied any such conversation or request for any money.

Marano further testified that Billups was not asking for the money from him "personally" (Tr. 994), but from Prudential. So, Marano went to Spiros Skouras, who has been President

of Prudential Lines, for over 20 years (Tr. 1993).

Skouras testified that Marano told him initially about the repairs to the Lash Pacifico (Tr. 1998), but that in a second conversation Marano told him that the company, Prudential, was going to be subjected to "large penalties" for non-compliance with the contract (Tr. 1998); however, Marano advised that he could "handle it" if Mr. Skouras made Prudential funds "available for him to handle it under the table" (Tr. 1998).

Mr. Skouras took that to mean that Marano was requesting funds "to make a bribe" (Tr. 1998), and he told Marano that such a payment was "out of the question"; that it was "an illegal act" and that he, Skouras, would not be a party to it (Tr. 1999). Skouras did not agree to or authorize Marano's

making any such payment, but on the contrary directed Marano not to do so. (Tr. 1999).

Then, contrary to instructions and directions of the President of Prudential Liens, Marano together with another employee, Mark Cappell, another convicted felon who admittedly had stolen also from his employer, Prudential, (Tr. 1445) planned with Marano to raise $10,000.00 in cash.

They contacted Lawrence C. Howard, Jr., then President of Nacirema Operating Company, whose office and home was in New York; and on November 26, 1975, (long after the ship had been unloaded, repaired and was back in service and had sailed out of the port of Hamptor Roads (Tr. 1167) Howard withdrew $10,000.00 from his own personal account (Tr. 1311) and delivered a personal check to Cappell for a "loan" on that

same day (Tr. 1313). Later that day, Chappell quickly abandoned efforts to have the check cashed because the bank officials were asking him too many questions (Tr. 1439). Although Marano was "very anxious" to have the check cashed (Tr. 1440) Cappell returned the check to Howard (Tr. 1441) and made no further efforts to ever raise the $10,000.00 (Tr. 1441).

Billups went to New York in November for a meeting at ILA International Headquarters (Tr. 2144) as he had done many times for Union business. On this occasion he had a meeting at headquarters with Union lawyers, which was the sole reason he traveled to New York. While there he called Marano, as Marano had suggested he do whenever he was "in town" (Tr. 2144) and later met him. No money was in any way requested of Marano for or received by Billups

(Tr. 2145).

IV. The Wienerwald Restaurant Incident

Count Eight, alleging a violation of Title 29 U.S.C. 186(b), a Taft-Hartley misdemeanor, arises out of events in the Wienerwald Restaurant, located in the Ramada Inn, 8th Avenue, New York City on August 11, 1978.

When the FBI learned that Billups was going to see Montella on routine Union business they made plans to have a microphone placed on Montella and directed Montella to take $2,000.00 that they gave him and give it to Billups (Tr. 617).

Montella and the FBI agents disagreed. Montella told them that he did not feel it was fair. He told the FBI agents that Billups had never called him for money; that Billups had never asked him for money and that he, Montella,

"don't think it's right that I should give him money" (Tr. 617).

Nevertheless, Montella was required to act as requested by the FBI and he met Billups for breakfast on the morning of August 11th.

They were seated in a booth in the Wienerwald Restaurant and the resulting tape of that conversation is replete with the loud background noise of dishes, utensils, etc. FBI Agent Wayne Smith testified that from 20 feet away (Tr. 898) he heard the "noise" of the envelope (Tr. 903).

Montella testified that he gave money to Billups during their conversation in the restaurant. Billups denied that he took or accepted any money from Montella, and that when Montella did take an envelope out of his pocket and placed it on the table (Tr. 2116) and said something to Billups like "Myles,

there is - - take this" (Tr. 2116); that he, Billups, gestured in a negative way to him, shook his head (Tr. 2116) and took nothing.

V. The Omni Hotel Incident

Count Nine likewise charges a violation of 29 U.S.C. 186(b), the facts concerning which arise out of a social meeting between Montella, Billups and one Frank Marrone, who was then an employee in Norfolk of Montella's Quin Marine. Montella testified that he arrrived alone and met Billups alone at which time he virtually immediately handed him an envelope with money. Billups denied ever being with Montella alone at that social meeting, but stated that Frank Marrone was with Montella when Billups joined them and that the three remained in each other's presence during the entire time that Montella allegedly passed an envelope to Billups

at the beginning of the conversation.

That meeting, having been directed and arranged by the FBI, was fully and completely witnessed and surveilled by seven FBI agents (Tr. 2013) who were stationed in and around the hotel before, during and after the social gathering occurred. None of them ever witnessed an envelope or anything passing to Billups.

ARGUMENT

I. THIS CASE PRESENTS A SERIOUS, COMPELLING, AND IMPORTANT CONSTITUTIONAL QUESTION OF FIRST IMPRESSION AS TO WHAT THE PROPER VENUE IS FOR A PROSECUTION UNDER 18 U.S.C. §186(b) OF THE TAFT-HARTLEY ACT.

Count Eight of the Indictment in the case at bar charges, in pertinent part, that "in the Eastern District of

Virginia and elsewhere, the defendant . ..did...receive, accept, and agree to receive and accept" money from immunized Government informant Montella in violation of §186(b)(1)(d) of the Taft-Hartley Act. (App. 7la) (emphasis added). The only proof adduced by the Government in support of Count Eight was exclusively confined to alleged acts which occurred entirely in New York City, not located within the Eastern District of Virginia. (App. 44a-45a).

In spite of the fact that the Government produced absolutely no proof that any of the acts alleged in violation of the statute occurred in the Eastern District of Virginia, the Trial Court overruled defendant's Motions for a judgment of acquittal on the basis of improper venue, made at the conclusion of the Government's evidence, and

renewed at the conclusion of all of the evidence, and after the verdict, reaching the heretofore unprecedented holding "that venue for prosecutions under 29 U.S.C. §186(b)(1) is proper in districts where commerce was 'affected' [by the receipt of the money] regardless of where payment took place." (App. 45a-46a).

The Trial Court rested its novel holding on the tenuous "fact that the working relationship between Quin Marine [Montella's New York-based company] and Billups was focused on the Hampton Roads area." (App. 45a-46a).

In respectfully submitting to this Court that this case presents a compelling opportunity for this Court to settle the unprecedented question of what the proper venue is for an alleged violation of the Taft-Hartley Act, the Petitioner respectfully directs the

Court's attention to several critical observations made by the Fourth Circuit in its Opinion.

First, the Fourth Circuit noted that "[V]enue in a federal criminal case is an issue of constitutional dimension," citing Article III and the Sixth Amendment of the United States Constitution, and noting that the constitutional underpinnings of venue in federal criminal cases are implemented by Federal Rule of Criminal Procedure 18. (App. 46a-47a).

Second, the Fourth Circuit observed that "[t]he critical inquiry in this case is deciding where the crime alleged was committed, since 29 U.S.C. §186(b) does not by its terms specify the situs of the offense there defined." (App. 47a).

Third, the Fourth Circuit commented on the unprecedented and novel nature

of the question presented:

> Neither we nor any other circuit have considered the question of whether venue for trial of a Section 186 violation lies in a district where commerce has been affected by an illegal offer or acceptance completed in another district.

(App. 49a).

Fourth, for the first time in Federal Criminal Jurisprudence, a United States Court of Appeals has made the heretofore unknown comparison of equating the same venue rationale under 18 U.S.C. §1951, also known as the Hobbs Act, and the Taft-Hartley Act, in spite of the fact that the Fourth Circuit acknowledges "the widely differing purposes of the Hobbs Act and the Taft-Hartley Act," (App. 51a) holding that:

> The same venue rationale, then, applies to this Taft-Hartley violation as applies to a Hobbs Act violation. Venue lies either wherever commerce is affected

> or wherever the proscribed act occurs.

(App. 52a).

The Fourth Circuit reaches this result by twisting the statutory underpinnings of the Hobbs and Taft-Hartley Acts. The Fourth Circuit reasons that "a sine qua non of a section 186(b) violation is that the forbidden act affect commerce." Id. at 29. Since the Hobbs Act contains an element "that such extortion or attempted extortion affect interstate commerce," (App. 51a) the Fourth Circuit reasons that the more expansive venue provisions underlining the Hobbs Act must also apply to the Taft-Hartly Act, citing United States v. Floyd, 228 F.2d. 913 (7th Cir.), cert. denied, 351 U.S. 938 (1956) as primary authority therefor. However, a close reading of Floyd, supra, clearly reveals that Floyd, supra, rested its

broad venue holding us to the Hobbs Act on the authority of 18 U.S.C. §3237, a special venue statute for offenses involving transportation and interstate commerce permitting prosecution "in any district from, through, or into which such commerce moves..." Floyd, supra, at 918-19. The Floyd, supra, Court's holding is directly linked to the language of the Hobbs Act itself, such similar language not being found on the face of the Taft-Hartley Act, which language requires that the extortion or attempted extortion "obstructs, delays, or affects commerce," making such a result a clear jurisdictional element of the offense, and bringing it within 18 U.S.C. §3237. 29 U.S.C. §186(b) on the other hand, only requires a receipt, and no Court has ever interpreted Section 186(b) venue in the fashion in which the Fourth Circuit has twisted

the limited holding of the Floyd, supra, opinion.

Petitioner respectfully submits that the Taft-Hartley Act is a very important congressional statute, which has frequent application throughout the federal courts, and has far-reaching impact on the day-to-day interaction of management and labor in every facet of American business. That the question of where the proper venue for a prosecution under this act lies is unsettled and has been given a novel, first impression interpretation by the Fourth Circuit, requires the careful scrutiny of this Court to ensure that constitutional rights and policy have not been breached.

That the District Court devoted considerable attention in its post-trial memorandum to this novel question, commenting at page 13 that "I have only

found three cases dealing with venue under Taft-Hartley; none is directly applicable here," further supports the compelling need for clarification of this constitutional question by this Court.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION OF A WIDELY-USED CONGRESSIONAL STATUTE, 18 U.S.C. §1951, ALSO KNOWN AS THE HOBBS ACT.

Count One of the Indictment in the case at bar charged that Billups violated 18 U.S.C. §1951, also known as the Hobbs Act, "by extorting and attempting to extort $10,000.00 from Marano [another immunized Government informant] 'induced by the wrongful use of fear.'" (App. 38a).

The Government's principal witness

on this point, and the alleged victim of the extortion, testified that he "'really couldn't say there was fear'" in his dealings with Petitioner. (App. 38a)

Although the Government attempted to rehabilitate the witness through re-direct examination, the following colloquy is the most that the Government was able to glean from this crucial witness who just had testified that he "'really couldn't say there was fear'":

> Q. When you were dealing with Mr. Billups in November and December of 1975 did you and Prudential have any fear, any economic concerns in your dealings with Mr. Billups?
>
> A. Well, the problem was we wanted to conclude the agreement with Mr. Billups so that we had no problems with the ILA in Norfolk.

(App. 39a)

In spite of Petitioner's Motions for a judgment of acquittal as to Count

One, the District Court and the Fourth Circuit held that Count One was sufficiently supported by the evidence to be submitted to the jury under an extortion theory.

This case presents an important question of statutory interpretation as to the Hobbs Act, as to whether or not asserted "economic fear" becomes so speculative, tenuous, remote, and slight, as to be insufficient as a matter of law to support an extortion theory submitted to the jury.

In addition, this case presents an important question of statutory interpretation as to the critical distinctions between an alleged extortion, a much more serious offense, and an alleged bribe, less serious than an alleged extortion. As the Fourth Circuit noted:

> Given the fact that Morano initiated dealings with Billups, it is arguable that the crime involved here was bribery, not extortion.

(App. 4la)

In light of the wide application of the Hobbs Act in Federal Criminal Procedure, and in light of the fact that this is an area of heretofore unarticulated holdings by this Court, as evidenced by the necessity of the Fourth Circuit to cite only Courts of Appeal cases, and in one critical instance, a District Court opinion, (App. 4la), Petitioner respectfully submits that this is a compelling and ripe ground for review by this Court.

III. THIS CASE PRESENTS A VERY IMPORTANT QUESTION REGARDING PETITIONER'S CRITICAL RIGHT TO PEREMPTORY JURY CHALLENGES, ON WHICH QUESTION THERE IS SQUARE CONFLICT BETWEEN SEVERAL CIRCUITS.

During the voir dire of the prospective jury panel, one juror, who later served on the jury, failed to disclose, when under a duty to do so, that her son had recently been a member of an ILA local, which local was known by Petitioner to be extremely hostile to Petitioner due to certain labor rulings made by Petitioner in the ordinary course of his busines responsibilities (App. 12a - 14a).

Although the District Court "concluded that Battle's [the juror in question] omission was inadvertent," (App. 16a) (emphasis added), the fact that the Fourth Circuit characterizes the juror's failure to disclose as an "omission" indicates that it is indisputable that the juror did fail to disclose information during voir dire when required to do so.

Petitioner respectfully submits that the Petitioner's right of peremptory challenge has been held by this Court to be "one of the most important rights secured to the accused." Pointer v. United States, 151 U.S. 396, 38 L.Ed. 208 (1894).

Petitioner cited substantial cases in his Brief to the Fourth Circuit, holding that where a prospective juror fails to disclose, whether inadvertently or otherwise, "a material fact, which, if disclosed, would probably have caused counsel to strike him from the jury," Carpenter v. United States, 100 F.2d 716, 717 (D.C. Cir. 1938), or where the juror's "silence" on voir dire misled counsel and "had the effect of nullifying the right of peremptory challenge," Consolidated Gas and Equipment Company of America v. Carver, 257 F.2d 111, 115 (10th Cir. 1958) then "a new trial

should ordinarily be granted." Carpenter, supra, at 717. See Photostat Corp. v. Ball, 338 F.2d 783, 786 (10th Cir. 1964) ("right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true."); see generally Frazier v. United States, 335 U.S. 497 (1948).

Furthermore, the Fourth Circuit initially issued an Opinion in which the Court noted that since Petitioner's attorneys had not claimed that "they would have utilized a peremptory challenge to strike" this juror "had this information been known" at the time of voir dire, that Petitioner's claim "must stand or fall on a conclusion that juror Battle was incapable of rendering an impartial verdict." (App. 53a - 54a)

However, as a result of Petitioner's Petition for Rehearing to the Fourth

Circuit, the Fourth Circuit issued a corrected Opinion in which that cited language and that entire paragraph referring to that language was deleted, since Petitioner respectfully directed the Fourth Circuit's attention to portions of the record where Petitioner's counsel had, in fact, represented that they would have utilized a peremptory challenge if this information had been known (App. 53a - 54a).

Nevertheless, the Fourth Circuit did not grant rehearing, and made no effort to address the compelling points in the above-cited cases submitted to the Fourth Circuit.

The result of the Fourth Circuit's action in correcting its Opinion, and its silence on this point, bring the Opinion into square conflict with the other decisions of other circuits as cited above.

This intercircuit conflict is especially troubling in light of the Fourth Circuit's reliance on this Court's recent opinion in Smith v. Phillips, 50 U.S.L.W. 4190, 4192 (Jan. 25, 1982), to hold that so long as Petitioner was given a chance to prove actual bias, no other asserted grounds for error in jury selection are meaningful. Accordingly, in granting certiorari to the Petitioner, this Honorable Court would be addressing an important intercircuit conflict on a question that presents itself in every jury trial, that is, the scope and breadth of a defendant's right to peremptory challenge, in the additional context of clarifying this Cours't Opinion in Smith, supra.

IV. THIS CASE PRESENTS AN IMPORTANT QUESTION OF STATUTORY INTER-

PRETATION REGARDING THE NOVEL APPLICATION BY THE FOURTH CIRCUIT OF UNDERLYING NEW YORK STATE LAW TO 18 U.S.C. §1952 (THE TRAVEL ACT) IN HOLDING THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE SUBMISSION OF THAT CHARGE TO THE JURY.

Count Two of the Indictment in the case at bar charges, in pertinent part, that the Petitioner "did travel in interstate commerce from the Eastern District of Virginia to New York with the intent to promote...an unlawful activity, said unlawful activity being bribery, in violation of the New York Penal Code," in violation of Title 18 U.S.C. §1952(a)(3). (App. 65a) (emphasis added)

In holding that there was sufficient "evidence from which the jury could conclude that Billups travelled...to New

York intending...to illegally receive money in order to favorably exert his influence within the ILA," (App. 27a) at 16, the Fourth Circuit made a heretofore unprecedented interpretation for Travel Act purposes of the underlying New York State bribery law by holding such bribery encompassed bribe receiving:

> BRIBING A LABOR OFFICIAL
>
> A person is guilty of bribing a labor official when, with intent to influence a labor official in respect to any of his acts, decisions or duties as such labor official, he confers, or offers or agrees to confer, any benefit upon him.
> New York Penal Law §180.15 (McKinney 1975).
>
> BRIBE-RECEIVING BY A LABOR OFFICIAL
>
> A labor official is guilty of bribe-receiving by a labor official when he solicits, excepts or agrees to accept any benefit from any other person upon an agreement or understanding that such benefit will influence him in respect to any of his acts, decisions, or duties as such labor official.
> New York Penal Law §180.24 (McKenney 1975).

Accordingly, in light of the fact that the Fourth Circuit has reached a novel interpretation of New York State law, which is crucial to the Travel Act, the Petitioner respectfully submits that important questions of statutory interpretation are presented in the Travel Act, a widely used federal criminal statute, as well as compelling questions about Petitioner's due process rights to be judged on the same crime charged in the Indictment, to-wit, the giving of the bribe, and not some different crime not charged in the Indictment, to-wit, the receipt of a bribe.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that

the Petition for Writ of Certiorari to this Honorable Court should be granted.

Respectfully submitted,

MYLES E. BILLUPS, SR.

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APPENDIX
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Appendix

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5213

United States of America, Appellee,

versus

Myles E. Billups, Sr., Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, District Judge.

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Sprouse, Judge Butzner, and Judge Kiser.

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Appeals
Fourth Circuit

FOR THE COURT,

William K. Slate, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5213

United States of America,

Appellee,

v.

Myles E. Billups, Sr.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, District Judge.

Argued: April 1, 1982 Decided: October 15, 1982

Before BUTZNER and SPROUSE, Circuit Judges, and KISER, * District Judge.

Stanley E. Sacks, Andrew M. Sacks (James C. Lewis, Sacks, Sacks & Larkin on brief) for Appellant; Justin W. Williams & Theodore S. Greenberg, United States Attorneys. (Elsie L. Munsell, United States Attorney and Phillip Krajewski, Assistant United States Attorney, on brief) for Appellee.

*Honorable Jackson L. Kiser, United States District Judge for the Western District of Virginia, sitting by designation.

CORRECTED OPINION, PAGE 9, DELETED FIRST PARAGRAPH

SPROUSE, Circuit Judge;

Myles Billups, Sr. appeals his multiple convictions, entered after a jury trial, for violating the Hobbs Act, 18 U.S.C. §1951, the Travel Act, 18 U.S.C. §1952(a)(3), and for two violations of the criminal provisions of the Taft-Hartley Act, 29 U.S.C. §186(b)(1).[1] He challenges the venue of the district court on one Taft-Hartley count, certain evidentiary rulings of the trial judge, comments made by the judge in the jury's presence, the district court's refusal to grant a new trial based on juror prejudice, and the government's withholding of allegedly exculpatory material. He also appeals the trial court's denial of a judgment of acquittal on the Hobbs Act count,

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[1]Billups was originally indicted under a ten-count indictment. At trial, two Taft-Hartley counts were dismissed. The jury rendered not guilty verdicts on two counts alleging Taft-Hartley violations, and on single counts alleging violations of the Hobbs and Travel Acts.

alleging that the government failed to prove that statute's requisite "fear" element. We affirm.

I.

Billups was an International Vice-President of the International Longshoremen's Association (ILA) at Norfolk, Virginia, obtaining that post after many years of work and union activity on the waterfront. In essence, the government's case charged that Billups abused his office through a series of illegal transactions involving extortion and the receipt of payoffs from maritime employers operating in the Norfolk/Hampton Roads area. More specifically, the Hobbs Act and Travel Act charges against Billups were based on incidents relating to his extortion of funds from a waterfront employer in order to "settle" a claim relating to the unloading of a freighter by nonunion labor - the

Lash Pacifico transaction. The Taft Hartley counts were based on Billups' activity in furnishing ILA longshoremen to a stevedoring company in the Hampton Roads area - the Quin Marine dealings.

The Lash Pacifico Transaction

In August 1975, the ship S. S. Lash Pacifico, a freighter owned by Prodential Lines, encountered difficulty unloading at Norfolk port and had to be unloaded at the Portsmouth, Virginia, naval yard by Navy personnel. In due course, the ILA claimed a contractual violation by Prudential for this work performed by non-ILA members. John Marano, a former executive vice-president of Prudential, testified that he contacted Prudential's stevedoring contractor, Nacirema, and was told that the union's claim for wages could be limited to $29,000, but that Myles Billups would have to be contacted to

arrange this. Marano notified his superior at Prudential of this, indicating that the ILA claim could possibly run upwards of $130,000. In September 1975, Marano telephoned Billups and, according to Marano, Billups stated that the claim could be reduced upon the payment to him of $10,000. Marano met with Prudential's board chairman, Spiros Skouras, who told Marano to "handle" the matter, but that Prudential would not be a party to illegal activity. Nevertheless, Marano again contacted Billups, who indicated a desire to deal directly with Prudential in this matter and in cash.

Shortly thereafter, Billups notified Marano that he would be in New York and would stop to see him. Marano and a confederate, Mark Cappell, contacted Howard, a Nacirema official, asking that Nacirema inflate its future bills to Prudential, thus generating the money

allegedly needed to bribe Billups. After initially rebuffing the plan, Nacirema's president agreed and gave Chappell a check for $10,000. Upon encountering difficulty in cashing the check at a New York bank, Chappell gave it to Marano, who then attempted to give it to the appellant. Billups refused the check, insisting on cash, and castigated Marano for "dragging his feet" in raising the $10,000.

Marano testified that Billups continually reminded him of this $10,000 "debt," and in an effort to raise the funds, Marano padded his expenses from a business trip to Morocco. In December, 1975, Marano met with Billups at Prodential headquarters in New York and delivered $4,000 in cash to him.

Marano left employment at Prudential shortly thereafter, and became an undercover agent after FBI agents confronted him with evidence of other waterfront

crimes in which he was involved. At the FBI's behest, Marano arranged to meet with Billups in Norfolk, and deliver $1,000, purportedly to "make good" on the Lash Pacifico deal. Marano was equipped with an electronic recording devise, and tapes of the Billups/Marano meeting were used as evidence at Billups' trial.

Billups at trial presented a different picture of these transactions. He denied receiving or requesting any money from Prudential or Marano, and contended that Marano had approached him and offered to donate $10,000 to an ILA charity as a token of appreciation for the handling of the Lash Pacifico incident. According to Billups, none of this was necessary, as the Contract Adjustment Board in Norfolk had set the ILA's Lash Pacifico claims at $29,000. Billups testified that he told Marano that if he cared to make such a donation, a $5,000 gift to the Eastern

Virginia Medical School would be adequate, and that he refused a $10,000 check from Marano because it was not made out to the medical school. At trial, Billups denied that statements recorded during the conversation with Marano were his, and denied any involvement in the solicitation or receipt of money for influencing the ILA actions regarding the Lash Pacifico incident. The jury, however, found Billups guilty of one Hobbs Act violation and one violation of the Travel Act.

The Quin Marine Dealings

Quin Marine is a New York-based concern which provides support services to shipping companies, and in 1976, it expanded its operations to the Norfolk, Virginia, waterfront. In order to operate, Quin Marine found it necessary to secure a "work gang," a regularly assigned crew of ILA members. According to its general

manager, William "Sonny" Montella, Quin Marine was initially rebuffed in these efforts by the local ILA. Montella testified that he contacted Billups for assistance, and that after Billups spoke on its behalf, Quin Marine obtained the needed work gangs. Montella further testified that shortly thereafter, he met Billups at the Omni Hotel in Norfolk and offered him $500 as "gratuity" for his help. Montella stated that although initially reluctant Billups took the money.

In the fall of 1977, Quin Marine was faced with a potential wildcat strike by ILA container repairmen. Montella stated that he met with Billups, who then "corrected" the problem. Montella testified that he thereafter gave Billups $1,000 in cash as a token of appreciation, and that he gave Billups a second $1,000 "gratuity" in January 1978, in accord with

the waterfront "tradition" of Christmas gratuities from employers to ILA leaders.

Montella's involvement in illegal payments to labor and management officials on the waterfront was discovered by the FBI, and in May 1978 he became an undercover agent. He met with Billups at the Wienerwald restaurant in New York City in August 1978 and passed him an envelope containing $2,000. During the meeting, Montella was equipped with an electronic tape recorder and was observed by an FBI agent. Montella met with Billups under similar circumstances at the Omni Hotel in Norfolk in October 1978 and gave him an envelope containing $1,000. At trial, Billups denied taking money and denied that it was his voice on the tapes of the purported Montella meetings introduced at trial. Billups' two Taft-Hartley convictions were based on these August and October transactions.

II.

A.

Billups contends on appeal that the nondisclosure of certain information by a juror during voir dire denied him a fair trial, and that his conviction therefore violated the fifth and sixth amendments.

Due to the large amount of publicity surrounding Billups' trial, the district judge required each prospective juror to complete a written questionnaire, and submit to oral examination (in groups of four or five) in chambers. One written question asked "[a]re you or any immediate member of your family a member of a labor union, and, if so, designate the name of the union and its local number, if any." Another question asked "[h]ave you or any immediate member of your family ever been employed or done business with anyone in the waterfront industry?" The juror in

question, Jadis Battle, gave a "no" response to the first question and a "yes" answer to the second.

Other prospective jurors in Battle's group asked the trial judge in chambers whether the question meant "currently" a member of a union, or "ever had been" a union member -- commenting that retired members of their families had been in a union. The judge noted their responses and "amended their answers accordingly." Battle said nothing during or after this colloquy, neither the prosecutors or Billups' attorneys questioned her, and she was selected to serve on the jury. After the trial, Billups discovered that Battle's son William was in fact a member of the ILA, albeit unemployed as a longshoreman, at the time of the voir dire. A post-trial evidentiary hearing was held by the district judge, during which Battle was interrogated both by the judge and

counsel. She testified that at the time of voir dire, she thought her son was a former member of the ILA, but later discovered he was in fact an inactive member, not in good standing for failure to pay his dues. The defense moved for a new trial on the ground of juror misconduct, contending that Battle heard other prospective jurors ask whether the question meant "current" or "current and past" union membership, and by her silence concealed a "material fact." They further argued that there was animosity between William Battle's local union and Billups, and that William Battle told an associate that Billups "was getting what was coming to him." William Battle did not testify at the post-trial hearing.

The appellant first argues that since juror Battle is related to someone who might be biased against Billups, she is presumed to be biased. He next contends

that the juror's failure to speak up and amend her answers at voir dire was tantamount to deliberate concealment, a sure indicium of bias. Finally, he maintains that even if the omission was unintentional, a new trial is necessary to preserve the "fairness" of the jury system.

The Supreme Court recently examined the problem of alleged juror misconduct discovered after conviction, and declined to hold that any "implied bias" automatically requires a new trial. The Court concluded instead that a post-trial hearing affording the defendant an opportunity to prove actual bias fulfills the requirements of due process. Smith v. Phillips, 50 U.S.L.W. 4190, 4192 (Jan. 25, 1982). That was precisely the procedure followed in this case. At the post-trial hearing, Judge Hoffman and attorneys for Billups and the government interrogated Battle, and Billups had the opportunity to present

testimony bearing on her ability to render an impartial verdict.

A review of the record indicates that Judge Hoffman concluded that Battle's omission was inadvertent, and that while her son conceivably could have been prejudiced against Billups, there was no showing that his alleged bad feelings towards Billups poisoned juror Battles' mind. See United States v. Bynum, 634 F.2d 768 (4th Cir. 1980). The record supports these conclusions, and we cannot say that the district court erred in finding that juror Battle did not harbor "actual bias" against Billups.

B.

Billups next contends that the government withheld exculpatory material after he filed a request for it. He argues that Prudential Lines conducted an in-house investigation of Marano and

Chappell after Marano's employment terminated, that the FBI knew of those investigations and had received copies of at least a portion of investigatory reports which dealt with Marano and his dealings at Prudential. He further argues that such material is exculpatory in that it supports an inference that Billups was an unknowing dupe in a complex scheme, engineered by Marano and Chappell, to defraud Prudential. The government responds that it was unaware of the report, that the defense apparently knew of it prior to trial, taking no steps to acquire it, and that in any event, it did not tend to exculpate Billups or impeach the testimony of Marano.

It is true that when a specific request for certain material has been made the failure of the government to respond is "seldom, if ever, excusable." United States v. Agurs, 427 U.S. 97, 106

(1976); Brady v. Maryland, 373 U.S. 82 (1963). Billups filed voluminous documents prior to trial requesting the government's release of Brady material. Although these pretrial motions contained over 25 Brady requests, each was general in nature. None requested Prudential reports in the hands of the government, and we cannot construe any of the motions as generically including the material in question. Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980). Thus, the request was not a "specific request for certain material." Billups' challenge, therefore, is viewed under the fule announced in Agurs, supra, governing the voluntary production or the production after a general request for exculpatory material:

> [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no

> reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id. at 112-13.

The material discovered post-trial and produced for examination by the district court consisted of documents relating to the tax-evasion guilty plea of Keith Nelson, a former Prudential employee, in which he states that Marano and Chappell were involved in payoff and kickback schemes, and reports of one Billy Carter, a private investigator hired by Prudential, involving allegedly illegal activities of Marano and Chappell while at Prudential, which were discovered in the files of the United States Customs Service. Searches of the government's archives both during and after the trial

failed to produce any Prudential investigative report dealing with Marano or Billups.

There is substantial direct evidence of Billups' accepting cash payments from Marano. Marano freely admitted his past wrongs while on the witness stand, so there was little, if any, impeachment value in the later-discovered material. The material, if weighed with all the evidence, would not have tended to create a reasonable doubt that Billups sought and accepted illegal payoffs from Marano. Therefore, we cannot agree that constitutional error occurred.

III.

Billups next argues that certain comments of the district judge in the jury's presence were prejudicial and denied him a fail trial.

A critical link in the government's

evidentiary chain was a series of audio tapes of meetings between Billups and Marano and meetings Billups and Montella. At trial, Billups essentially denied that certain inculpatory statements in the recorded conversations were made by him and testified that it was not his voice on the tapes produced at trial. While Billups was testifying, the following colloquy took place:

> The Court: Was anybody else with you and Mr. Marano at the time of your meeting?
>
> Mr. Billups: No sir.
>
> The Court: Well, can you recognize Mr. Marano's voice?
>
> Mr. Billups: Yes sir.
>
> The Court: Well, who do you think would be the other voice, a ghost?

Billups' attorneys objected to this exchange the following day at a conference in the judges' chambers. An offer of an immediate

limiting instruction was refused by defense counsel for tactical reasons, and the trial judge at the close of the trial gave the jury the following instruction:

> The law does provide me the privilege of commenting to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts and the jury may disregard entirely, since the jurors are the sole judges of the facts. Probably during the lengthy trial I have made some statement perhaps in attempted humor which would possibly be construed by you as a comment on the evidence in the case. I now charge you in addition to what I have just stated that you should disregard any comment by me during the rial and prior to giving this charge, as the law is clear that the credibility of a witness is solely for your determination.

In his post-trial memorandum, the trial judge concluded that, in retrospect, the remark "probably should not have been made," but if it was error, the defendant waived it by failing to object at the first opportunity at which the jury was

not present. Federal Rule of Evidence 614 provides:

> (a) Calling by court. The Court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
>
> (b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.
>
> (c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

The record discloses that Billups was the last witness on the day in question, March 23, and when the trial resumed the next day, March 24, he took the stand as the first witness. The defense, therefore, had two opportunities, at the end of the day on the 23rd and at the beginning of proceedings on the 24th, when the jury was not present, to object to Judge Hoffman's interrogation.

As the Advisory Committee's Notes to Rule 614(c) make clear, the rule is "designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures." Billups attorneys, by waiting until after his testimony to raise the issue with Judge Hoffman defeated the purpose of the rule by preventing the contemporaneous correction of the preceived error, and thus waived any objection on appeal. Additionally, we have examined the entire record and conclude that while the court's remarks may have been improvident, they did not deprive Billups of a fair trial before an impartial judge and jury, see United States v. Cole, 491 F.wd 1276, 1278 (4th Cir. 1974); United States v. Cunningham, 423 F.2d 1269, 1276 (4th

Cir. 1970), and that the judge's curative instructions served to assist the jury in giving proper weight to his comments.

IV.

Billups next contends that the trial court erred in not granting his motion for a judgment of acquittal on the Travel Act count.[2] The indictment charged that Billups traveled to New York in December, 1975, to meet Marano,

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[2] The Travel Act, 18 U.S.C. §1952, provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --
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> . . . .
>
> (b) (2) [carry on] extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

intending to engage in bribery in violation of New York law, and that he thereafterperformed acts in furtherance of that unlawful activity. Billups argues that while he did meet with Marano in New York in December, his intent when he began the interstate trip controls, and that the purpose of his trip was to conduct legitimate union business.

A review of the record discloses ample evidence from which the jury could conclude that Billups travelled from Virginia to New York intending to meet with Marano and to illegally receive money in order to favorably exert his influence within the ILA. The trial court therefore properly allowed the jury to consider this count.

V.

Relying on Federal Rules of Evidence 403 and 404,[3] Billups next challenges the admission of "prior bad acts" evidence relating to two separate series of incidents.

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[3] Rule 403.

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is

At trial, the government introduced testimony relating to the receipt by Billups of a $500 gratuity from Sonny Montella in October 1976 and of a $1,000 payment from John Marano in August 1977. Each of these transactions had been the subject of an indictment count that was dismissed by the trial judge. The trial judge ruled that the evidence was relevant to show Billups' "opportunity" to take payoffs and to show knowledge, intent, motive and capacity. Billups

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Footnote 3 continued:

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404.

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally.

argues that the opportunity or ability to meet waterfront employees was conceded, so admission on that ground was irrelevant. Also, the limiting instruction to the jury was confined to the opportunity ground, rendering the court's other justifications invalid.

The trial judge instructed the jury at the time of Montella's testimony as follows:

> THE COURT: Now I say, ladies and gentlemen of the jury, specifically in this connection without suggesting that there was or was not any $500 that was transferred from Mr. Montella to Mr. Billups I want you to know that Mr. Billups is not charged with any specific offense involving the $500. The main purpose of the admissibility of this evidence is to show that

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Footnote 3 continued:

Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence

such opportunity if any that you think on the part of Mr. Billups may have had by reason of that act in connection with future acts, not for that act alone.

If the government's other evidence was to be believed, it presented a pattern of transactions between Billups and Montella, and the challenged evidence was clearly relevant to show the development of a common plan or scheme. Billups' argument focuses on the work "opportunity" in the limiting instruction. While the fact of his ILA office provides evidence of "opportunity" to take money from employers for union favors, thus diminishing he need for further proof on that point,

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Footnote 3 continued:

of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim

the instruction as a whole clearly contemplates consideration of the $500.00 payment in light of the entire series of transactions. We believe, therefore, that the district court did not abuse its discretion in admitting this testimony.

Marano's testimony regarding his payment to Billups of $1,000.00 on August 1, 1977, was likewise admissible. Marano testified that this payment was to partially satisfy his $10,000.00 "debt" to Billups, and was plainly relevant to complete the picture of a "common plan

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Footnote 3 continued:

offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts

or scheme." The evidence was relevant and probative, and the limiting instruction to the jury, while not as complete as it should have been, clearly stated to the jury that it "cannot find him guilty" for the August 1 transaction.

B.

Billups' other "bad act" evidentiary challenge relates to the rebuttal testimony of Embri Stokes, the president of an ILA local, that Billups solicited payoffs from him over a long period of time. Fourteen waterfront employers had testified, during Billups' case in

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Footnote 3 continued:

is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

chief, that Billups never solicited gratuities or payoffs from them in return for his "services" as a union leader. The Secretary-Treasurer of ILA Local 1248 in Norfolk, testified that Billups had a good reputation for honesty, and related the manner in which Billups ran union meetings so as to preserve the appearance of "above board" dealings. Billups on direct examination denied soliciting or accepting "anything" from waterfront employers. He denied accepting "under the table" payments from employers or from local union presidents, particularly Embri Stokes.

Stokes then testified on rebuttal that, over the course of several years, he gave Billups gratuities in exchange for Billups' favorable action on the issuance of additional port numbers, settlement of jurisdictional disputes and other actions benefitting Stokes'

local. Billups contends admission of this testimony was error in that it violated the express provisions of Rule 404(b), was unduly prejudicial under Rule 403, and was inadmissible to impeach his general denials on cross-examination.

This court met a similar contention in United States v. Johnson, 634 F.2d 735 (4th Cir. 1980), cert. denied, 451 U.S. 907 (1981), and what we said there is directly applicable here:

> Particularly where, as here, a defendant in a criminal case by her own testimony and that of others has deliberately sought as the primary means of defense to depict herself as one whose essential philosophy and habitual conduct in life is completely at odds with the possession of a state of mind requisite to guilt of the offense charged, that defendant may be considered in effect to have forfeited any protection that the first sentence of the Rule might otherwise have provided against the type of "other act" evidence here challenged. See Walder v. United States, 347

U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954).

Id. at 737-38. Balancing the probative value of the challenged evidence against its potential for prejudice to Billups' defense, we hold that the trial judge acted within his discretion in admitting it.[4]

VI.

We find no merit in Billups' contention that there was insufficient evidence upon which to base the jury's instruction of consciousness of guilt. The Court informed the jury:

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[4]Billups further argues that Stokes' testimony would only have been admissible if he were an employer, a member of the same "class" as the employer witnesses. Not only do the facts in Johnson disarm this argument, but it borders on the incredible to urge that the fourteen employer witnesses were presented to prove that Billups was honest and upstanding only as to employers. The direct evidence of good character offered by Billups was intertwined with the principal issue of whether he extorted money. See United

> Without suggesting that there was or was not an attempt to suppress or fabricate evidence by the defendant after a crime has been committed, that, alone, is not, of course, sufficient to establish guilt. Of course either the prosecution or its attorneys or the defendant or his attorneys have a perfect right to interview prospective witnesses in any case. You may consider evidence of such attempts if it existed. However along with the other evidence in the case in determining guilt or innocence, whether or not it attempts the fabrication or suppression of evidence showing consciousness of guilt and a significance to be attached to any such attempt are matters for the jury to determine.

As we have previously state, "[t]he law is well established that, in a criminal case, evidence of a defendant's attempt

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Footnote 4 continued:

States v. Benedetto, 571 F.2d 1246 (2d Cir. 1978).

In light of our holding that Stokes' testimony was admissible to rebut the testimony of the employers presented in Billups' case in chief, we need not address the propriety of its use to impeach Billups' testimony on cross-examination. See United States v.

to influence a witness to testify regardless of the truth is admissible against him on the issue of criminal intent." United States v. Reamer, 589 F.2d 769, 770 (4th Cir. 1978), cert. denied, 440 U.S. 980 (1979). The testimony of Charles Chambers, Nacirema's stevedoring supervisor, provided sufficient evidence to support the instruction.[5] He testified that Billups approached him on two occasions attempting to tailor Chamber's version of Marano's contributions to support Billups' position that they were for charitable purposes.

Footnote 4 continued:

Pantone, 609 F.2d 675 (3d Cir. 1979).

[5]Further support for this instruction is found in United States v. McDougald, 650 F.2d 532, 533 (4th Cir. 1981), in which we held that where the defendant makes specific exculpatory statements of fact which are later contradicted at trial, the jury may infer from them a consciousness of guilt.

VII.

The indictment charged that Billups violated the Hobbs Act, 18 U.S.C. §1951,[6] by extorting and attempting to extort $10,000.00 from Marano "induced by the wrongful use of fear." Billups argues that there was insufficient evidence of fear to sustain his conviction for violating this section.

Billups bases his argument for reversal on John Marano's testimony, on cross-examination, that he "really couldn't say there was fear" in his dealings with Billups. On re-direct examination by the government the following colloquy took place:

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[6]The Hobbs Act, 18 U.S.C. §1951, provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do,

> Q. When you were dealing with Mr. Billups in November and December of 1975 did you and Prudential have any fear, any economic concerns in your dealings with Mr. Billups?
>
> A. Well, the problem was we wanted to conclude the agreement with Mr. Billups so that we had no problems with the ILA in Norfolk.

The government contends that this testimony, coupled with Marano's "genuine and reasonable" fear that failure to pay Billups the amount promised would lead to labor unrest at Prudential was sufficient to fulfill the Hobbs Act's fear requirement.

Footnote 6 continued:

or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both.

(b) As used in this section--

. . . .

(2) The term "extortion" means the obtaining of property from another, with

Fear of economic harm is, of course, sufficient to sustain a Hobbs Act violation, United States v. Iozzi, 420 F.2d 512, 515 (4th Cir. 1970), cert. denied, 402 U.S. 943 (1971). The fear need not be the consequence of a direct or implicit threat by the defendant, United States v. Duhon, 565 F.2d 345 (5th Cir.), cert. denied, 435 U.S. 952 (1978), and the government's burden of proof is satisfied if it shows that the victim feared an economic harm, and that the circumstances surrounding the alleged extortionate conduct rendered that fear reasonable. United States v. Sander, 615 F.2d 215 (5th Cir.), cert. denied. 449 U.S. 835 (1980).

Footnote 6 conintued:

his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Given the fact that Marano initiated dealings with Billups, it is arguable that the crime involved here was bribery, not extortion. See United States v. Rabbitt, 583 F.2d 1014 (8th Cir.), cert. denied, 439 U.S. 116 (1978); see generally United States v. Cerilli, 603 F.2d 415, 427-37 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980), (Aldisert, J., dissenting). Hoever, bribery and extortion are not mutually exclusive, United States v. Furey, 491 F.Supp. 1048, 1057 (E.D. Pa. 1980), aff'd, 636 F.2d 1211 (3d Cir. 1981), and so long as the defendant intends to exploit the reasonable fear of the victim, Duhon, supra, at 351, his actions will constitute extortion under the Hobbs Act. The jury was presented with sufficient evidence from which it could conclude that although Marano may have initiated the payoff scheme, the payment and

promises of payment to Billups were the direct result of a perceived, reasonable fear on Marano's part that noncompliance with the deal already struck could lead to Billups' economic retaliation.[7]

VIII.

Finally, we disagree with Billups' argument that venue in the Eastern District of Virginia was improper for trial of count eight of the indictment alleging a violation of 29 U.S.C. § 186(b)(1).

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[7]We likewise find no merit to Billups' contention that there was insufficient evidence that the extortion would "affect commerce." As we stated in United States v. Santoni, 585 F.2d 667 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979), even a de minimis effect on commerce resulting from a Hobbs Act extortion is sufficient to bring the charged criminal activity within the statute. The evidence adduced at trial was sufficient to prove that Prudential was engaged in activities affecting interstate commerce, and that the poten-

A.

The indictment on which Billups was convicted charged in pertinent part that:

> 2. On or about August 11, 1978, in the Eastern District of Virginia and elsewhere, the defendant MYLES E. BILLUPS, SR., being a representative of employees who were employed in an industry affecting commerce, to-wit, Vice-President of the I.L.A., Vice-President of the Atalntic Coast District Council of the I.L.A., President of Hampton Roads District Council of the I.L.A., and President of I.L.A. Local 1970, did knowingly, willfully and unlawfully receive, accept, and agree to receive and accept a payment and delivery of money from William A. Montella, a representative of Quin Marine, the employer of such employees. (In violation of Title 29, United States Code, Section 186(b)(1) and (d).

The Taft-Hartley Act, 29 U.S.C. Section 186 (a)(1) and (b)(1), states in relevant part:

> (a) It shall be unlawful for any employer or association or employers or any person who acts as a labor relations

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Footnote 7 continued:

tial payment of the $10,000 and the actual payment of the $4,000 would effect transactions in commerce.

expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

29 U.S.C. §186(a)(1), (b)(1).

The government's principal evidence as to count eight of the indictment was provided by the testimony of William "Sonny" Montella. In essence, Montella testified that while he was in New York, Billups telephoned him from New York and asked that they meet. The meeting was arranged for the Wienerwald Restaurant, also in New York. At the restaurant, Montella passed Billups an envelope containing

2,000 in cash. The offer and acceptance of the payment therefore was proved to have occurred in New York. The proof linking Billups' acceptance of the money in New York with the Eastern District of Virginia was the fact that the working relationship between Quin Marine and Billups was focused on the Hampton Roads area -- admittedly sufficient to show that commerce in the Hampton Roads area was "affected" by the receipt of the money.[8] The trial court concluded that venue for prosecutions under 29 U.S.C. §186(b)(1) is proper in districts

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[8]The parties stipulated that Montella's company, Quin Marine, was engaged in commerce, and the jury was instructed, apparently in reliance on that stipulation, that:

> it is not necessary for the Government to prove that that act of receiving or accepting such money took place in Virginia. It is sufficient for the Government to prove beyond a reasonable doubt that the defendant took the money

where commerce was thus "affected," regardless of where payment took place. We agree.

B.

Venue in a federal criminal case is an issue of constitutional dimension. Article III guarantees a federal defendant a trial "in the State where the said Crimes shall have been committed" and the sixth amendment provides him with a "jury of the State and district wherein the crime shall have been committed." These fundamental guarantees have been implemented by Federal Rule of Criminal Procedure 18 which provides that "[e]xcept as otherwise permitted by statute or these rules, the prosecution

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Footnote 8 continued:

and was at the time a representative of ILA members employed in the Port of Hampton Roads by Quin Marine Services. It has already been stipulated, of

shall be had in a district in which the offense was committed." The critical inquiry in this case is deciding where the crime alleged was committed, since 29 U.S.C. §186(b) does not by its terms specify the situs of the offense there defined. See Johnson v. United States, 351 U.S. 215, 220 (1956). Since Congress has not explicitly provided for venue under section 186(b), the situs of the offense "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Anderson, 328 U.S. 699, 703 (1946). The usual method for making this determination, one which we have consistently approved, is an examination of the verbs

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Footnote 8 continued:

course, that Quin Marine Services was an industry affecting commerce.

employed in the statute to define the offense, United States v. Kibler, 667 F.2d 452, 454 (4th Cir.), cert. denied, 102 S.Ct. 2037 (1982); United States v. Blecker, supra at 632; United States v. Walden, 464 F.2d 1015, 1018 (4th Cir.), cert. denied, 409 U.S. 867 (1972), 410 U.S. 969 (1973), although this method is not exclusive. As Judge Hoffman points out in his able opinion ruling on this point in the district court proceeding, there are crimes where the situs is not so simple of definition. So it is here -- we cannot so easily garner and apply to the statute involved all of the rationale of Article III, the sixth amendment and Rule 18 from one single verb. The protected interest is in Virginia where commerce is affected, however, and other basic venue considerations flow from that reality.

Neither we nor any other circuit have considered the question of whether venue for trial of a section 186 violation lies in a district where commerce has been affected by an illegal offer or acceptance completed in another district. However, it has been held that venue for a Hobbs Act violation will lie wherever commerce is affected,[9] and the government contends that the same rationale applies to this Taft-Hartley Act violation.

The Hobbs Act, 18 U.S.C. §1951(a), covers a broad spectrum of crimes affecting any activity in interstate commerce, whereas section 186 of the Taft-Hartley Act relates only to the giving of anything of value by a person

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[9] United States v. Craig, 573 F.2d 513 (7th Cir.), cert. denied, 439 U.S. 820 (1978).

of a specified class to representatives of employees of an industry affecting commerce.[10]

The courts construing congressional intent as to venue in Hobbs Act violations have determined that venue lies wherever commerce is affected or wherever the robbery, extortion, attempt, conspiracy or threat occurs, Craig, supra; United States v. Floyd, 228 F.2d 913 (7th Cir.), cert. denied, 351 U.S. 938 (1956), and the Seventh Circuit in Floyd concluded that:

> the [Hobbs Act extortion] offense consists of two essential elements,

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[10] The Hobbs Act provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do

> (1) extortion or attempted extortion, and(2) that such extortion or attempted extortion affect interstate commerce. In our judgment, and we so hold, venue may be properly laid either in the jurisdiction wherein the coercion is perpetrated or in that wherein commerce is affected thereby.

Id. at 919.

We cannot agree with the government that entire rationale of the opinion in Floyd applies to the case sub judice because of the widely differing purposes of the Hobbs Act and the Taft-Hartley Act. We do agree, however, that one element of a section 186(b) Taft-Hartley offense is that the "giving" must be proved to be to a representative of an employee of an industry affecting commerce. In other words, if a donor or offerer were to give or offer a thing of value

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Footnote 10 continued:

anything in violation of this section shall be fined not more than $10,000

to a person other than a representative of an employee of a commerce-affecting industry, there would be no offense under that section. Although worded differently, a sine qua non of a section 186(b) violation is that the forbidden act effect commerce. The same venue rationale, then, applies to this Taft-Hartley violation as applies to a Hobbs Act violation. Venue lies either wherever commerce is affected or wherever the proscribed act occurs.

AFFIRMED.

Footnote 10 continued:

or imprisoned not more than twenty years, or both.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5213

United States of America, Appellee,

versus

Myles E. BIllups, Sr., Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffmann, District Judge.

IT IS ORDERED that the opinion in this case is amended by deleting the first full paragraph on page 9 which reads as follows:

It is observed initially that neither in the trial nor on appeal has there been any representation that had Billups' attorneys known William Battle's actual status with the ILA, they would have utilized a peremptory challenge to strike Jadis Battle. Thus there can be no claim that had this information been known, Billups' attorneys would have invariably stricken Battle from the array. See United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977); see generally United States v. Jones, 608 F.2d 1004, 1009 (4th Cir. 1979), cert. denied, 444 U.S. 1086 (1980) (Murnaghan, J., dissenting). Billups' claim, therefore, must stand or fall on a conclusion that juror Battle was incapable of rendering an impartial verdict thus denying Billups a fair trial before an

unbiased jury.

Entered at the direction of Judge Sprouse with the concurrence of Judge Butzner and Judge Kiser.

FOR THE COURT,

/s/ William K. Slate, II
CLERK

FILED
Apr 29 1983
US Court of Appeals
Fourth Dircuit

Title 18 U.S.C. § 1951, the Hobbs Act, provides:

INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section-

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force,

or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State

through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect Section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

Title 18 U.S.C. § 1952, the Travel Act, provides:

INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to-

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years,

or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub.L. 91-513, Title II, §701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

Title 29 U.S.C. §186(b), of the Taft-Hartley Act, provides:

RESTRICTIONS ON FINANCIAL TRANSACTIONS

. . .

REQUEST, DEMAND, ETC., FOR MONEY OR OTHER THING OF VALUE

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of

value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, that nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF VIRGINIA, NORFOLK DIVISION
(Filed November20, 1980)

UNITED STATES OF AMERICA

v. DR. NO. 80-146-N

MYLES E. BILLUPS, SR.

NOVEMBER 1980 TERM - At Norfolk, Virginia

THE GRAND JURY CHARGES THAT:

INTRODUCTION

At all times material to Counts One through Nine of this Indictment:

1. The defendant, MYLES E. BILLUPS, SR. was Vice-President of the International Longshoreman's Association (hereinafter I.L.A.); Vice-President of the Atlantic Coast District Council of the I.L.A.; President of Hampton Roads District Council of the I.L.A., and President of I.L.A. Local 1970, Port of Hampton Roads, Virginia.

2. Prudential Lines, Incorporated (hereinafter Prudential) a Delaware corporation, with offices at One World Trade Center, New

York City, was a worldwide steamship line engaged in interstate and foreign commerce at various ports including the Port of Hampton Roads, Virginia.

3. John R. Marano was Vice-President of Prudential.

4. Quin Marine Services, Inc. (hereinafter Quin Marine) was a New York corporation with offices in Manhattan and Brooklyn, New York, Norfolk, Virginia and elsewhere and was a marine service and repair business.

5. Quin Marine was a business engaged in and the activities of which affected interstate commerce and whose employees belonged to and were represented by the I.L.A. and other labor organizations related to and affiliated with the I.L.A.

6. William A. Montella was the general manager of Quin Marine.

COUNT ONE

1. Paragraphs 1 through 3 of the Introduction are hereby realleged and

incorporated by reference as though set forth in full.

2. On or about November 26, 1975 in the Eastern District of Virginia, the defendant, MYLES E. BILLUPS, SR., did knowingly, willfully and unlawfully obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951, and did attempt to do so, by extortion, as defined in Title 18, United States Code, Section 1951, that is to say, the defendant did obtain and attempt to obtain property, of another, to-wit: approximately $10,000 from John R. Marano, as agent, officer and representative of Prudential Lines, with his consent, induced by the wrongful use of fear.

(In violation of Title 18 United States Code, Section 1951).

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 3 of the Introduction are hereby realleged and incorporated by reference as though set forth in full.

2. On or about November 26, 1975, the defendant MYLES E. BILLUPS, SR., did travel in interstate commerce from the Eastern District of Virginia to New York with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being bribery, in violation of the New York Penal Code and thereafter the defendant, MYLES E. BILLUPS, SR., did perform and attempt to perform acts to promote, manage, carry on and facilitate the promotion, management and carrying on of said unlawful activity. (In violation of Title 18, United States Code, Section 1952(a)(3)).

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 3 of the

Introduction are hereby realleged and incorporated by reference as though set forth in full.

2. On or about December 19, 1975, in the Eastern District of Virginia, the defendant, MYLES E. BILLUPS, SR., did knowingly, wilfully and unlawfully obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951, and did attempt to do so, by extortion, as defined in Title 18, United States Code, Section 1951, that is to say, the defendant did obtain and attempt to obtain property of another, to-wit: approximately $4,000 from John R. Marano, as agent, officer and representative of Prudential Lines, with his consent, induced by the wrongful use of fear. (In violation of Title 18, United States Code, Section 1951).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 3 of the Introduction are hereby alleged and incorporated by reference as though set forth in full.

2. On or about December 17, 1975, the defendant MYLES E. BILLUPS, SR., did travel in interstate commerce from the Eastern District of Virginia to New York with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being bribery, in violation of the New York Penal Code; thereafter the defendant MYLES E. BILLUPS, SR., did perform and attempt to perform acts to promote, manage, carry on and facilitate the promotion, management and carrying on of said unlawful activities in violation of Title 18, United States Code, Section 1952(a)(3).

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 and 4 through 6 of the Introduction are hereby realleged and incorporated by reference as though set forth in full.

2. In or about May 1976, in the Eastern District of Virginia, the defendant MYLES E. BILLUPS, SR., being a representative of employees who were employed in an industry affecting commerce, to-wit: Vice-President of the I.L.A., Vice-President of the Atlantic Coast District Council of the I.L.A., President of Hampton Roads District Council of the I.L.A., and President of I.L.A. Local 1970, did knowingly, willfully and unlawfully receive, accept, and agree to receive and accept a payment and delivery of money from William A. Montella, a representative of Quin Marine, the employer of such employees. (In violation of Title 29, United States Code, Section 186(b)(1) and (d)).

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 and 4 though 6 of the Introduction are hereby realleged and incorporated by reference as though set forth in full.

2. In or about October 1977, in the Eastern

District of Virginia, the defendant, MYLES E. BILLUPS, SR., being a representative of employees who were employed in an industry affecting commerce, to-wit, Vice-President of the I.L.A., Vice-President of the Atlantic Coast District Council of the I.L.A., President of Hampton Roads District Council of the I.L.A., and President of I.L.A. Local 1970, did knowingly, willfully and unlawfully receive, accept, and agree to receive and accept a payment and delivery of money from William A. Montella, a representative of Quin Marine, the employer of such employees. (In violation of Title 29, United States Code, Section 186(b)(1) and (d)).

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES:

1. Paragraphs 1 and 4 through 6 of the Introduction are hereby realleged and incorporated by reference as though set forth in full.

2. In or about January 1978, in the Eastern District of Virginia, the defendant, MYLES E. BILLUPS SR., being a representative of employees who were

employed in an industry affecting commerce, to-wit, Vice-President of the I.L.A., Vice-President of the Atlantic Coast District Council of thc I.L.A., President of Hampton Roads District Council of the I.L.A., and President of I.L.A. Lɔcal 1970, did knowingly, willfully and unlawfully receive, accept, and agree to receive and accept a payment and delivery of money from William A. Montella, a representative of Quin Marine, the employer of such employees. (In violation of Title 29, United States Code, Section 186(b)(1) and (d)).

COUNT EIGHT

THE GRAND JURY CHARGES THAT:

1. Paragraphs 1 and 4 through 6 of the Introduction are hereby realleged and incorporated by reference as though set forth in full.

2. On or about August 11, 1978, in the Eastern District of Virginia and elsewhere, the defendant MYLES E. BILLUPS, SR., being a representative of employees who were employed in an industry affecting commerce, to-wit, Vice-President

of the I.L.A., Vice-President of the Atlantic Coast District Council of the I.L.A., President of Hampton Roads District Council of the I.L.A., and President of I.L.A. Local 1970, did knowingly, willfully and unlawfully receive, accept, and agree to receive and accept a payment and delivery of money from William A. Montella, a representative of Quin Marine, the employer of such employees. (In violation of Title 29, United States Code, Section 186(b)(1) and (d)).

COUNT NINE

THE GRAND JURY FURTHER CHARGES:

1. Paragraphs 1 and 4 through 6 of the Introduction are hereby realleged and incorporated by reference as though set forth in full.

2. On or about October 3, 1978, in the Eastern District of Virginia, the defendant MYLES E. BILLUPS, SR., being a representative of employees who were employed in an industry affecting commerce, to-wit, Vice-President of the I.L.A., Vice-President of the Atlantic Coast District Council of the I.L.A., President of Hampton Roads District Council of the I.L.A.,

and President of I.L.A. Local 1970, did knowingly, willfully and unlawfully receive, accept, and agree to receive and accept a payment and delivery of money from William A. Montella, a representative of Quin Marine, the employer of such employees. (In violation of Title 29, United States Code, Section 186(b)(1) and (d)).

COUNT TEN

THE GRAND JURY FURTHER CHARGES:

1. On or about August 1, 1977, in the Eastern District of Virginia, the defendant MYLES E. BILLUPS, SR., being an officer and employer of a labor organization engaged in an industry affecting commerce, to-wit: Vice-President of the I.L.A., Vice-President of the Atlantic Coast District Council of the I.L.A., President of Hampton Roads District Council of the I.L.A., and President of I.L.A. Local 1970, did knowingly, willfully and unlawfully receive, accept and agree to receive and accept a payment and delivery of money from John R. Marano, an employer, with intent that his receipt and acceptance of this

money influence his actions, decisions and duties as said officer and employee. (In violation of Title 29, Section 186(b)(1) and (d)).

A TRUE BILL

_____
Foreman

Justin W. Williams
Justin W. Williams
United States Attorney

J. Phillip Krajewski
J. Phillip Krajewski
Assistant United States Attorney

Theodore S. Greenberg
Theodore S. Greenberg
Assistant United States Attorney

No. 82-1932

In the Supreme Court of the United States

OCTOBER TERM, 1983

MYLES E. BILLUPS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

FRANCIS J. MARTIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether venue for a prosecution under the Taft-Hartley Act, 29 U.S.C. 186(b), is proper in the district where commerce is affected.

2. Whether the evidence of the victim's economic fear was sufficient to sustain petitioner's conviction for extortion under the Hobbs Act, 18 U.S.C. 1951.

3. Whether a juror's inadvertent nondisclosure during voir dire that her son was an inactive member of a union requires a new trial.

4. Whether petitioner was improperly charged under the Travel Act, 18 U.S.C. 1952, with engaging in bribery where the evidence showed that he received a bribe.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1932

MYLES E. BILLUPS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court's post-trial opinion denying a motion for acquittal or a new trial is reported at 522 F. Supp. 935. The opinion of the court of appeals (Pet. App. 2a-52a) is reported at 692 F.2d 320. The amendment to the opinion of the court of appeals (Pet. App. 53a-54a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1982 and amended on April 29, 1983. A petition for rehearing was denied on March 29, 1983 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of interfering with commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; one

count of interstate transportation to carry on an unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952; and two counts of accepting illegal payments as a representative of a labor organization from an employer, in violation of the Labor Management Relations Act of 1947, 29 U.S.C. 186(b) (Taft-Hartley Act).[1] Petitioner was sentenced to three years' imprisonment on the Hobbs Act count, three years' imprisonment on the Travel Act count, and one year on each of the Taft-Hartley Act counts, all to be served concurrently. Petitioner was also fined $5,000 on each of these four counts. The court of appeals affirmed (Pet. App. 2a-52a).

1. The facts as reflected in the opinion of the court of appeals are as follows. Petitioner was International Vice-President of the International Longshoremen's Association (ILA) in Norfolk, Virginia (Pet. App. 4a). In essence, he was charged with abusing his office through a series of illegal transactions involving extortion and the receipt of payoffs from maritime employers operating in the Norfolk/Hampton Roads area.

a. In August 1975, the *S.S. Lash Pacifico*, a freighter owned by Prudential Lines (Prudential), encountered difficulty unloading at the port in Norfolk, Virginia, and had to be unloaded by navy personnel at the naval yard in Portsmouth, Virginia (Pet. App. 5a). When the ILA claimed that the work performed by non-ILA members violated its contract with Prudential, John Marano, vice-president of Prudential, contacted the company's stevedoring contractor. Marano was told that the union's wage claim, which could have been for as much as $130,000, could be limited to $29,000, but that petitioner would have to be contacted to make the necessary arrangements (*id.* at 5a-6a).

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[1]Petitioner was originally indicted on ten counts. At trial, two Taft-Hartley Act counts were dismissed for insufficient evidence. In addition, petitioner was acquitted on two Taft-Hartley Act counts, one Travel Act count and one Hobbs Act count (Pet. App. 3a n.1).

In September 1975, Marano contacted petitioner, who stated that he could settle the claim if he were paid $10,000 (Pet. App. 6a). In a subsequent conversation, petitioner told Marano that he preferred to deal directly with Prudential and to deal in cash. The first attempt to pay petitioner failed because Marano only had a check for $10,000. When petitioner arrived, he refused to accept the check, insisting on payment in cash and he complained to Marano about "dragging his feet" (*id.* at 7a). Petitioner's Hobbs Act conviction was based on petitioner's demand for $10,000 to arrange for the labor dispute to be settled.

Petitioner continually reminded Marano of the $10,000 "debt." In December 1975, Marano met with petitioner at Prudential's headquarters in New York. On this occasion Marano gave petitioner $4,000 in cash (Pet. App. A7). Petitioner's Travel Act conviction was based on petitioner's having traveled to New York to accept the $4,000 bribe.

b. In 1976, Quin Marine, a New York-based company, which provides support services to shipping companies, expanded its operations to the Norfolk, Virginia waterfront (Pet. App. 9a). In order to operate, Quin Marine found it necessary to secure a "work gang," which is a regularly assigned crew of ILA members. When initial efforts failed, William "Sonny" Mortella, Quin Marine's general manager, contacted petitioner for assistance. With petitioner's help, Quin Marine obtained the necessary work gangs (*id.* at 10a). Shortly thereafter Mortella met petitioner at a Norfolk hotel and offered him a $500 "gratuity" for his help, which petitioner accepted (*ibid.*).

In May 1978, after two other payments to petitioner for his help in solving ILA problems with Quin Marine, Mortella became an FBI informant because the agency discovered his involvement in illegal payments to labor and management officials on the waterfront (Pet. App. 11a). In

two tape recorded meetings with petitioner, Mortella made additional payments of $2,000 and $1,000. The $2,000 payment was made in August 1978 at the Wienerwald restaurant in New York City. The $1,000 payment was made in October 1978 at the Omni Hotel in Norfolk (*ibid.*). These two payments formed the basis of petitioner's Taft-Hartley Act convictions.

2. Prior to trial the district court conducted an extensive voir dire (Pet. App. 12a). All jurors were asked whether any of their relatives were members of a union and whether any relative had ever worked on the waterfront (*ibid.*). One juror answered "no" to the first question but "yes" to the second. The juror's son had been a dockworker, but he had been unemployed for some time and the juror assumed that her son was no longer a member of the union (*id.* at 13a). The juror was neither questioned nor objected to by either side and she was therefore selected to serve on the jury (*ibid.*).

After the trial, petitioner discovered that the juror's son was still a member of a local of the ILA, although he was inactive and not in good standing for failure to pay dues. The local to which the son belonged had a bad relationship with petitioner because of decisions petitioner had made as an officer of the union, and, indeed, the juror's son was himself hostile toward petitioner (Pet. App. 13a-14a). Petitioner moved for a new trial charging juror misconduct. The district court held a hearing at which the juror testified and after which the court denied petitioner's motion. The district court held that the juror's omission was inadvertent and that, whatever ill will her son may have felt toward petitioner, there was no showing that it had in any way poisoned the juror's mind against him (*id.* at 16a).

3. The court of appeals affirmed petitioner's convictions (Pet. App. 2a-52a). The court first held that the district court's post-trial hearing on the issue of whether the juror's

alleged misconduct affected the impartiality of her verdict was procedurally and substantively correct under *Smith* v. *Phillips*, 455 U.S. 209 (1982), and that the determination of no prejudice was fully supported by the record (Pet. App. 12a-16a). With regard to petitioner's Travel Act conviction, the court rejected petitioner's claim that there was insufficient evidence that he went to New York with an intent to accept a bribe. Instead, it found "ample evidence" to support the finding of intent (Pet. App. 27a). With regard to petitioner's Hobbs Act conviction, the court rejected petitioner's claim that there was insufficient evidence that the victim had agreed to pay petitioner $10,000 out of fear of economic harm, which is extortion, as opposed to an anticipated economic benefit, which arguably is bribery. The court held that the key is whether petitioner "intend[ed] to exploit the reasonable fear of the victim" (Pet. App. 41a), and that the evidence was sufficient to support the jury's finding that petitioner did (*id.* at 42a). Finally, the court held that venue for petitioner's Taft-Hartley Act convictions was proper because the evidence proved that the economic effect of the crime would be felt in the Eastern District of Virginia—where the employer making the payoff did its business (Pet. App. 42a-51a).

ARGUMENT

1. Petitioner contends (Pet. 21-29) that the courts below erred in ruling that venue for a Taft-Hartley Act prosecution will lie in the district where commerce is affected as opposed to the place where the money is received. This claim does not warrant review by this Court.

The Taft-Hartley Act does not have a specific venue provision. The district court reasoned that the language[2]

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[2]The Hobbs Act, 18 U.S.C. 1951, provides that "[w]hoever * * * affects commerce * * * by * * * extortion * * *" commits a crime. It is the requirement that the extortion must "affect[] commerce" which

and purpose[3] of the Taft-Hartley Act were closely analogous to those of the Hobbs Act and accordingly concluded that venue in the district where the effect of the crime on interstate commerce is felt, which is proper under the Hobbs Act, should also be permissible under Taft-Hartley Act. Since it is settled that Hobbs Act venue is proper in any district where the extortion affects commerce, see *United States* v. *Craig*, 573 F.2d 513, 517 (7th Cir. 1978); *United States* v. *Floyd*, 228 F.2d 913, 917 (7th Cir.), cert. denied, 351 U.S. 938 (1956), the district court and court of appeals held that venue was proper in this case because it is undisputed that the payoffs would affect commerce in the Eastern District of Virginia where the employer did its business.

The analysis of the courts below is reasonable and, as petitioner himself emphasizes (Pet. 21, 23, 24-25, 28-29), the issue has never been decided by any other court. Accordingly, review by this Court at this time is plainly unwarranted.[4]

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gives rise to venue under the Hobbs Act in the district where commerce is affected. *United States* v. *Craig*, 573 F.2d 513 (7th Cir. 1978); United States v. *Floyd*, 228 F.2d 913 (7th Cir.), cert. denied, 351 U.S. 938 (1956). The Taft-Hartley Act, 29 U.S.C. 186(a) and (a)(1), makes it unlawful "for any employee * * * to pay * * * any money * * * to any representative of any of his employees * * * in an industry affecting commerce." As the district court correctly noted, *United States* v. *Billups, supra*, 522 F. Supp. at 949, both the Hobbs Act and the Taft-Hartley Act require that the illegal payment affects commerce.

[3]The Hobbs Act was passed in 1948 and was directed at proscribing racketeering activities which affect commerce. In particular, it sought to differentiate between legitimate labor activity and labor racketeering. *United States* v. *Staszcuk*, 517 F.2d 53, 57 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975). The Taft-Hartley Act was passed in 1947 and sought to attack labor corruption and racketeering by prohibiting payoffs to union officials from employers engaged in an industry affecting commerce. 29 U.S.C. 186(a).

[4]Petitioner has not addressed the district court's alternative holding that any objection regarding venue was waived by failure to make such an objection prior to trial. *United States* v. *Billups, supra*, 522 F. Supp. at 951.

2. Petitioner contends (Pet. 29-32) that there was insufficient evidence to support his extortion conviction under the Hobbs Act because the victim testified that he really did not "fear" petitioner. There is no merit to this inherently factual claim.

It is clear that a victim's fear of economic harm can provide a sufficient basis for an extortion conviction under the Hobbs Act. See, *e.g., United States* v. *Gerald,* 624 F.2d 1291 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981); *United States* v. *Rabbitt,* 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *United States* v. *Rastelli,* 551 F.2d 902 (2d Cir.), cert. denied, 434 U.S. 831 (1977); *United States* v. *Hathaway,* 534 F.2d 386 (1st Cir.), cert. denied, 429 U.S. 819 (1976). Both courts below found ample evidence that petitioner's victim, Prudential vice-president Marano, actually and reasonably feared economic harm (522 F. Supp. at 940-945; Pet App. 40a-42a). Petitioner repeatedly demanded payment of the $10,000 for his assistance in the *Lash Pacifico* settlement. In addition, Marano knew that petitioner had the power as an officer of the ILA to disrupt Prudential's operations through actions such as a work slowdown, which could cause large economic losses to the company. Such evidence was more than sufficient to establish petitioner's effort to exploit Marano's reasonable fear of economic loss. See *United States* v. *Sander,* 615 F.2d 215, 219 (5th Cir. 1980); *United States* v. *Hathaway, supra,* 534 F.2d at 395; *United States* v. *Quinn,* 514 F.2d 1250, 1266-1267 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976).

3. Petitioner contends (Pet. 32-37) that the juror's inadvertent failure during voir dire to disclose her family relationship with a member of an ILA union local infringed upon his right to make peremptory challenges and thus warrants the granting of a new trial. This claim is without merit.

This Court held in *Smith* v. *Phillips*, 455 U.S. 209, 212-218 (1982), that in cases of alleged juror misconduct, the proper course is a post-trial hearing into the issue of whether the juror was actually prejudiced. See *Remmer* v. *United States*, 347 U.S. 227 (1954). In *Smith*, a juror had applied for a job as an investigator in the district attorney's office. The prosecutors learned of the juror's application during trial, but did not make any disclosure to the court. A post-trial disclosure was made and the state trial court held a hearing after which it concluded that the juror had not been prejudiced. This Court upheld that finding and held generally that the trial court's post-trial hearing on the issue of actual juror bias was the proper remedy for allegations of juror partiality. 455 U.S. at 218.

The facts underlying petitioner's claim are, if anything, less likely to be prejudicial than the situation in *Smith* v. *Phillips*. The juror's misstatement was inadvertent[5] and, in any event, she did indicate that a member of her family had worked on the waterfront, and that revelation did not even provoke petitioner's counsel to inquire further. Moreover, as in *Smith*, the district court examined the witness and concluded that there was no prejudice. That factual finding does not warrant review by this Court.

4. Finally, petitioner contends (Pet. 37-40) that the evidence was insufficient to sustain his Travel Act (18 U.S.C. 1952) conviction because the indictment charged that his travel was to promote the illegal activity of bribery, in violation of the New York Penal Code, but the evidence showed that his travel was for the purpose of receiving a

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[5]In the absence of a deliberate non-disclosure, there is no basis for petitioner's claim that his right to make peremptory challenges was abridged. *United States* v. *Brooks*, 677 F.2d 907, 912-913 (D.C. Cir. 1982); *Williams* v. *United States*, 418 F.2d 372, 376-377 (10th Cir. 1969).

bribe. This claim, which is raised for the first time in this Court, is frivolous.

In petitioner's view, the government was required to frame the indictment so as to track the statutory framework which exists within the New York Penal Code. That code lists as separate offenses bribing a labor official, N.Y. Penal § 180.15 (McKinney 1975), and receipt of a bribe by a labor official, *id.* § 180.25. Petitioner's complaint is that he should have been charged with interstate travel to promote the illegal activity of "bribe receiving" rather than "bribery." The reference to bribery in the charging language of the indictment is not, however, a reference to state law but to the scope of the illegal activities encompassed by the Travel Act, 18 U.S.C. 1952(b)(2). Moreover, this Court has specifically held that the appropriate inquiry is not the manner in which states classify their criminal prohibitions, but whether the particular state involved prohibits the activity charged. *United States* v. *Nardello,* 393 U.S. 286, 295 (1969). Accordingly, there was no variance between the indictment and proof in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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